Supreme Court, U.S.
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No. 03-___

IN THE

Supreme Court of the United States

RONALD H. MANNING,
Petitioner,

v.

CHEVRON CHEMICAL COMPANY, LLC,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a charging party's failure to attach the correct legal conclusion to the factual statement contained in a charge is a mere technical defect which may be amended after the filing period has expired.

2. Whether the time to file an EEOC charge for subsequent discriminatory acts is equitably tolled when a charging party detrimentally relies on the timeliness of an amended charge, federal regulations and case law, and the actions of the EEOC and employer.

PARTIES TO THE PROCEEDINGS

1. Ronald H. Manning, Petitioner

2. Victoria L. Plante, Attorney for Petitioner Ronald H. Manning

3. Chevron Chemical Company, LLC, Respondent

4. Holly Williamson of Littler Mendelson, P.C., Attorneys for Respondent Chevron Chemical Company, LLC

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Course of the Proceedings and Disposition Below	3
B. Statement of Facts	4
REASONS FOR GRANTING THE WRIT	9
SUMMARY	9
ARGUMENT AND AUTHORITY	10
I. THE COURTS OF APPEAL ARE DIVIDED ON WHETHER A CHARGING PARTY'S FAILURE TO ATTACH THE CORRECT LEGAL CONCLUSION TO THE FACTUAL STATEMENT CONTAINED IN A CHARGE IS A MERE TECHNICAL DEFECT WHICH MAY BE AMENDED AFTER THE FILING PERIOD HAS EXPIRED	10
II. THE RELATIONS BACK DOCTRINE IS CONSISTENT WITH THE STATUTORY AND REGULATORY PROVISIONS OF TITLE VII AND THE ADA.	12

TABLE OF CONTENTS—Continued

Page

III. THE TIME TO FILE AN EEOC CHARGE FOR SUBSEQUENT DISCRIMINATORY ACTS IS EQUITABLY TOLLED WHEN A CHARGING PARTY DETRIMENTALLY RELIES ON THE TIMELINESS OF AN AMENDED CHARGE, FEDERAL REGULATIONS AND CASE LAW, AND THE ACTIONS OF THE EEOC AND EMPLOYER 17

CONCLUSION 22

APPENDICES 1a

TABLE OF AUTHORITIES

CASES

Page

Alcom Electronic Exchange Inc. v. Burgess, 849 F.2d 964 (5th Cir. 1988). 10
Blumberg v. HCA Mgmt. Co., 848 F.2d 642 (5th Cir. 1988) 18
Davis v. Sodexho Cumberland College, 157 F.3d 460 (6th Cir. 1998) 10
Duggins v. Steak n Shake, 195 F.3d 828 (6th Cir. 1999) 11
Edelman v. Lynchburg College, 535 U.S. 106 (2002) 12, 16, 17
Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996) 11
Fairchild v. FormaScientific, Inc., 147 F.3d 567 (7th Cir. 1998) 11
Gonzalez-Aller Bakeyro v. GTE Lenkurt, Inc., 702 F.2d 857 (10th Cir. 1983) 18
Holtz v. Rockerfeller & Co., 258 F.3d 62 (2nd Cir. 2001) 11
Hornsby v. Conoco, Inc., 777 F.2d 243 (5th Cir. 1985) 4, 10
Lawrence v. Cooper Communities, 132 F.3d 447 (8th Cir. 1998) 18
Love v. Pullman Co., 404 U.S. 522 (1971) 17, 19, 21
Manning v. Chevron Chemical Co., LLC, 332 F.3d 874 (5th Cir. 2003) 1, 13
Miranda v. B&B Cash Grocery Store, Inc., 975 F.2d 1518 (11th Cir. 1992) 18
Morgan v. Washington Mfg., Co., 660 F.2d 710 (6th Cir. 1981) 18
National Railroad Passenger Corp. v. Abnermorgan, Jr., 536 U.S. 101 (2002) 13, 16
O'Shiver v. Levin, Fishbein, Sedren & Berman, 38 F.3d 1380 (3rd Cir. 1994) 18

TABLE OF AUTHORITIES—Continued

Page

Purrington v. Univ. of Utah, 996 F.2d 1025 (10th Cir. 1993) 20
Sanchez v. Conoco, Inc., 431 F.2d 455 (5th Cir. 1970) 4, 10, 15
Simms v. State of Oklahoma, 165 F.3d 1321 (10th Cir. 1999) 11
Waiters v. Robert Bosch Corp., 683 F.2d 89 (4th Cir. 1982) 18
Washington v. Kroger Co., 671 F.2d 1072 (8th Cir. 1982) 11
Zipes v. Trans World Airlines, 455 U.S. 385 (1981) 14, 17, 18, 19

STATUTES AND REGULATIONS

28 U.S.C. § 1254 (2003) 1
42 U.S.C. § 2000e-5(e)(1) (2003) 2, 12
42 U.S.C. § 2000e-5(b) (2003) 13, 14
42 U.S.C. § 12112 (2003) 3
42 U.S.C. § 12117(a) (2003) 2, 12
29 C.F.R. § 1601.12(a) (2003) 14
29 C.F.R. § 1601.12(b) (2003) 2, 10, 15
29 C.F.R. § 1601.21(b)(1) (2003) 2, 5

MISCELLANEOUS

Black's Law Dictionary (6th Ed. 1990) 21

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Manning v. Chevron Chemical Company, LLC*, is reported at 332 F.3d 874 (5th Cir. 2003). *Appendix B*. The opinion of the court of appeals denying the Petition for Rehearing En Banc is published at 2003 U.S. App LEXIS 15387. *Appendix A*.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 13, 2003. *Appendix B*. The decision denying the Petition for Rehearing En Banc was entered on July 15, 2003. *Appendix A*. This Petition for Writ of Certiorari is filed within 90 days of the entry of that order. This Court has jurisdiction to hear this matter under 28 U.S.C. § 1254.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. 2000e-5(e)(1) states in relevant part, "a charge shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred."

42 U.S.C. 12117(a) provides in relevant part, "the powers, remedies and procedures set forth in . . . the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) shall be the powers, remedies, and procedures this title provides to the Commission, Attorney General or to any other person alleging discrimination on the basis of disability in violation of any provision of this act . . . concerning employment."

29 C.F.R. § 1601.12(b) provides in part, ". . . a charge is sufficient when the commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received."

29 C.F.R. § 1601.21(b)(1), provides in part, "in cases where the Commission decides to reconsider a dismissal or a determination finding reasonable cause to believe a charge is

true, a notice of intent to reconsider will promptly issue. If such notice of intent to reconsider is issued within 90 days from receipt of a notice of right to sue and the charging party has not filed suit and did not receive a notice of right to sue pursuant to § 1601.28(a)(1) or (2), the notice of intent to reconsider will vacate the dismissal or letter of determination and revoke the notice of right to sue. . . . After reconsideration the Commission will issue a determination anew. In those circumstances where the notice of right to sue has been revoked, the Commission will, in accordance with § 1601.28, issue a notice of right to sue anew which will provide the charging party with 90 days within which to bring suit."

STATEMENT OF THE CASE

A. Course of the Proceedings and Disposition Below

This is a race, gender, disability and retaliation lawsuit brought by Ronald H. Manning ("Petitioner") against Chevron Chemical Company, LLC ("Respondent"), after the Equal Employment Opportunity Commission ("EEOC") issued a right to sue on November 26, 1999. *Appendix E.* This action was timely filed in the United States District Court for the Eastern District of Texas, Beaumont Division pursuant to the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5 et seq. ("Title VII"), and the Americans With Disabilities Act of 1990, as amended, 42 U.S.C. § 12112 et seq.

The court granted summary judgment on all of Petitioner's claims. *Appendix C.* Following entry of the final judgment on September 10, 2001, Petitioner timely filed his notice of appeal on October 5, 2001.

The United States Court of Appeals for the Fifth Circuit affirmed the district court decision. Petitioner timely filed a Petition for *En Banc* Rehearing because the panel decision

directly contradicted Fifth Circuit precedent on amended charges of discrimination. *See Hornsby v. Conoco, Inc.*, 777 F.2d 243, 247 (5th Cir. 1985); and *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970). Petitioner also requested correction or amendment of the opinion.[1] The court denied this request as well as the request for rehearing *en banc* on July 15, 2003.

Petitioner timely filed this Petition for Writ of Certiorari on October 14, 2003.

B. Statement of Facts

Petitioner was denied promotion to two T-1 positions on June 16, 1998. As a result, Petitioner timely filed an EEOC charge of discrimination in or about October 1998. In his charge, Petitioner alleged that Respondent had retaliated against him for prior claims of discrimination and discriminated against him because of his race and gender.

The EEOC accepted his charge and began its investigation. In a letter to the EEOC dated December 14, 1998, Respondent responded to Petitioner's charge. In this letter, Respondent concentrated on Petitioner's alleged performance during the oral interview. Specifically, Respondent claimed Petitioner tended to "ramble" and "repeat himself" when answering interview questions. Additionally, it claimed that Petitioner's skills articulated during the oral interview were not as strong as selected candidates, Noyes and Williams.[2] To support the reason for its decision, Respondent provided the EEOC with copies of the Candidate Evaluation Forms for Noyes, Williams, and Petitioner. On Petitioner's form, it read

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[1] The appellate opinion contains material incomplete and inaccurate statements of fact to support the court's rationale.

[2] As its legitimate non discriminatory reason, Respondent stated that Noyes and Williams were the "best qualified candidates" based on the oral interviews.

"AMERICAN DISABILITY ACT - STUTTERER."[3] In or about July 1999, the EEOC provided Petitioner with a copy of Respondent's letter with attached documents in or about July 1999. Manning also received an EEOC right to sue notice in July 1999.

On September 27, 1999, Manning for the first time consulted with an attorney about the EEOC claims and right to sue notice. At that time, Petitioner retained Victoria Plante ("Attorney Plante"), as his attorney to file a lawsuit against Respondent for retaliation and race and gender discrimination. During the initial consultation, Attorney Plante noticed Petitioner's severe stuttering disability and speech impediment. Attorney Plante also reviewed the documents and response letter Respondent submitted to the EEOC. Based on this information, Attorney Plante promptly notified the EEOC of a potential violation of the Americans with Disabilities Act (ADA) by telephone on September 29, 1999, based on information obtained during the EEOC investigation. One day later, Attorney Plante sent a letter dated September 30, 1999, to the EEOC District Director H. Joan Ehrlich and requested that Petitioner be allowed to amend his charge to include a disability discrimination claim for denial of the T-1 positions. Specifically in her letter, Attorney Plante alerted the EEOC that Respondent had provided this information during the investigation period that revealed possible violations of the ADA. *See Appendix E* at 49a.

The EEOC received this letter on October 1, 1999, and promptly responded. On October 6, 1999, acting under the authority of Section 1601.21(b)(1) of the EEOC's Procedural

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[3] The record of appeal reflects Respondent became aware of Petitioner's stuttering problem as early as 1977 when Petitioner first interviewed with the company. The interviewer made notes regarding Petitioner's stuttering problem.

Regulations, the EEOC District Director vacated and revoked the Dismissal and Notice of Rights dated July 9, 1999. The EEOC advised the Respondent and Petitioner that it would continue the investigation and issue a Dismissal and Notice of Rights anew which would provide the Petitioner with 90 days within to bring suit in accordance with EEOC Regulation 1601.28. *Appendix E* at 47a.

The EEOC continued the investigation that included a disability discrimination allegation for denial of the 1998 T-1 positions. In a letter to Respondent dated October 28, 1999, the EEOC requested additional information related to the amended charge. *Appendix E* at 45a. Respondent responded to the request in a letter dated November 15, 1999. *Appendix E* at 43a. Petitioner formally amended his charge with verification on November 20, 1999, adding the allegation of disability discrimination.[4] *Appendix E* at 41a.

After the continued investigation of the disability claim; Petitioner was issued a new Dismissal and Notice of Rights on November 26, 1999. *Appendix E* at 38a. The notice provision stated Petitioner could bring a lawsuit in federal court for retaliation, race, gender and disability discrimination within 90 days. More importantly, under the reasons given for dismissing Petitioner's charge, the EEOC did not select the reason which states, "[y]our charge was not timely filed with the Commission, .i.e., you waited too long after the date(s) of the discrimination alleged to file your charge. Because it was filed outside the time period prescribed by law, the Commission cannot investigate your allegations." *Appendix E* at 38a.

In reliance on this notice, Petitioner timely filed his lawsuit on February 22, 2000, in the United States District Court for

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[4] While requesting an amendment to his charge orally on September 29, 1999, and in writing on September 30, 1999, the charge was not formally amended until November 20, 1999, due to administrative delay.

the Eastern District of Texas, Beaumont Division, alleging retaliation and discrimination on the basis of race, gender and disability for denial of promotion to the T-1 positions.

Approximately three (3) months after Petitioner filed suit, Respondent informed Petitioner that he would be terminated as a result of a reduction in force effective September 1, 2000. Petitioner requested transfer to approximately 14 lateral positions available at other neighboring Chevron facilities. In or about June 2000, personnel at Chevron's Cedar Bayou facility (Nethery and Meeks) interviewed Respondent for some of the lateral positions. During the interview, Nethery wrote discriminatory notes regarding Respondent's speech and performance during the interview. Nethery noted Respondent was "very slow talking; rambles, mental focus seem off and slow; acts 20 years (or more) older than he is!; uh, uh, uh . . . let's see; sleepy and bewildered looking." Based on the interview, Petitioner was notified of July 18, 2000, that he did not receive any of the Cedar Bayou positions.

The discriminatory notes were produced by Respondent during litigation in or about November 2000. Based on these notes, in December 2000, Petitioner filed a motion for leave of court to amend his complaint to include disability discrimination for denying him transfer to the Cedar Bayou positions.[5] Respondent did not file a response in opposition to Petitioner's motions for leave to add an additional

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[5] As background, Manning filed three motions for leave to amend his complaint. The first motion was filed and granted in June 2000, to correct clerical and contextual defects in the pleadings. The second motion was filed and granted in August 2000, after Respondent was informed that he had not received any of the transfer positions at neighboring facilities (Cedar Bayou and Kingwood) because of retaliation. The third motion was filed and granted in or about December 2000 and January 2001. The third amended complaint alleged disability discrimination for the denial of Cedar Bayou transfer positions in July and November 2000.

disability allegation for the Cedar Bayou positions. Petitioner took the depositions of Nethery and Meeks and specifically questioned them regarding Petitioner's stuttering problem during the oral interview for the Cedar Bayou positions.

On March 26, 2001, Respondent moved for summary judgment but *did not* address or request summary judgment on the disability discrimination claim for the Cedar Bayou positions. Due to discovery delays, on May 25, 2001, Petitioner timely responded to the summary judgment motion specifically argued against summary judgment based on the discriminatory notes and the deposition testimony of Nethery and Meeks.

For the first time on June 5, 2001, Respondent alleged that Petitioner had failed to exhaust his administrative remedies on the disability claim for the Cedar Bayou positions.[6] Petitioner responded to Respondent's affirmative defense during oral argument on June 14, 2001. At the completion of oral argument, the court granted summary judgment on all Petitioner's disability and retaliation claims and took under advisement Petitioner's race and gender claims for the T-1 positions. As a result of the oral ruling of the court that the disability claim was time barred, Petitioner, as precaution, filed a new charge of disability discrimination with the EEOC in July 2001 for denial of the Cedar Bayou positions. On September 7, 2001, the court granted Respondent summary

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[6] Prior to May 15, 2001 (which is 300 days after Petitioner was notified that he had not received three Cedar Bayou positions), Respondent did not raise this defense in its summary judgment motion filed on March 26, 2001, because Petitioner, as precaution, would have simply filed a new EEOC charge for a disability claim for the Cedar Bayou positions. At the lower level, Petitioner alleged that in failing to raise failure to exhaust administrative remedies for the Cedar Bayou positions in its summary judgment motion or any other pleading, Respondent waived it. The lower courts did not address this issue in their opinions.

judgment on the remainder of Petitioner's claims. Petitioner timely appealed.[7]

REASONS FOR GRANTING THE WRIT

Summary

The writ should be granted because:

1) The Courts of Appeal are divided on whether an amended charge alleging a different type of discrimination relates back to the filing date of the original charge;

2) Any rules prohibiting amended charges alleging a different type of discrimination after the filing period is inconsistent with federal statute and regulation;

3) Without review, a charging party's rights will be cut off when, after the filing deadline, the EEOC investigation reveals another type of discrimination not alleged in the original charge;

4) Charging parties' rights should not be affected because they do not attach correct legal conclusions to the factual statement in their charges; and

5) This Court must articulate the circumstances under which lowers courts may apply equitable tolling or estoppel to promote uniformity among the circuits and to deter abuse of discretion.

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[7] After granting summary judgment, the EEOC dismissed the July 2001 disability charge based on the district court's summary judgment. Within 90 days, Petitioner timely filed another lawsuit pro se' in January 2002, after receiving his right to sue for his disability claim. The district court dismissed the complaint concluding Petitioner's disability claim was subject to res judicata and thereby barred. Thereafter, the district court imposed sanctions against Petitioner for filing the second lawsuit. In order to protect his rights in case of reversal of summary judgment, Petitioner took precaution to protect his claim, to no avail.

ARGUMENT AND AUTHORITY

I. THE COURTS OF APPEAL ARE DIVIDED ON WHETHER A CHARGING PARTY'S FAILURE TO ATTACH THE CORRECT LEGAL CONCLUSION TO THE FACTUAL STATEMENT CONTAINED IN A CHARGE IS A MERE TECHNICAL DEFECT WHICH MAY BE AMENDED AFTER THE FILING PERIOD HAS EXPIRED.

Courts of Appeal have struggled with the issue of whether an amended charge alleging a different type of discrimination relates back to the date of the original charge. The reason for the conflict among the courts of appeal is each circuit's interpretation of the federal regulation 29 C.F.R. § 1601.12 (b). Some courts have interpreted this regulation to mean that a charge alleging a different legal conclusion after the filing deadline is amendable and relates back to the original filing date so long as the facts included in the original and amended charges are the same or similar. *See Hornsby v. Conoco Inc.*, 777 F.2d 243, 247 (5th Cir. 1985)(affirming *Sanchez's* holding that the amended charge related back to the original charge because the facts alleged in both charges were identical); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 464 (5th Cir. 1979) (holding that the selection of the type of discrimination alleged, i.e. the selection of which box to check, is in reality nothing more than a legal conclusion to the facts alleged and thereby related back to the date of the original charge);[8] *See also Davis v. Sodexho Cumberland College*, 157 F.3d 460, 463-64 (6th Cir.1998)(analyzing

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[8] In this case, the lower courts' opinions directly conflict with prior precedent in *Sanchez* and *Hornsby*. Typically where there is conflict in authority, the older rule controls. *Alcom Electronic Exchange Inc. v. Burgess*, 849 F.2d 964, 967 (5th Cir. 1988). Moreover, *Sanchez* is a better well-reasoned opinion based on the interpretation of the statute and regulation at issue.

Sanchez and concluding when the EEOC investigation of one charge in fact reveals evidence of a different type of discrimination against the plaintiff, a lawsuit based on the newly understood claim will not be barred); *Duggins v. Steak n Shake*, 195 F.3d 828, 833 (6th Cir. 1999)(holding a lay complainant should not be precluded from bring suit because of the failure to attach the correct legal conclusion); and *Washington v. Kroger Co.*, 671 F.2d 1072, 1075-76 (8th Cir. 1982)(concluding where an aggrieved person is a non-lawyer who may be unaware of the true basis for the allegedly discriminatory acts until after an investigation is made, a lawsuit that alleges a basis different from that alleged at the EEOC level will not be time-barred).

Yet others courts have held that an untimely amended charge alleging a different type of discrimination does not relate back unless the amendment "relates or grows out of" the original charge of discrimination. *See Holtz v. Rockerfeller & Co.*, 258 F.3d 62, 83-84 (2d Cir. 2001)(holding that an unsworn claim made more than a year after the original charge was filed was barred unless it was reasonably related to the allegations in the original charge); *Simms v. State of Oklahoma*, 165 F.3d 1321, 1326 (10th Cir. 1999)(barring the amended charge of retaliation because the original charge of race discrimination contained a theory of recovery and did not mention retaliation or facts supporting such a claim); *Fairchild v. FormaScientific, Inc.*, 147 F.3d 567, 575-76 (7th Cir. 1998)(declining to follow *Sanchez* and concluding that an untimely amendment alleging an entirely new theory or recovery does not relate back to a timely filed original charge); and *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 963 (4th Cir. 1996)(concluding that an amended age discrimination charge does not necessarily flow from sex discrimination and vice versa).

The major problem with cases opposing late amendments alleging a different type of discrimination is the interpretation

of the regulation. This Court must ensure that lower courts' interpretation is consistent with federal law.

II. THE RELATIONS BACK DOCTRINE IS CONSISTENT WITH THE STATUTORY AND REGULATORY PROVISIONS OF TITLE VII AND THE ADA.

The Supreme Court recently interpreted the charge statute and the validity of the EEOC regulation governing amendments in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). While not specifically addressing whether late amendments to allegation of discrimination relate back to the original filing date, this Court held that there was nothing plain in the reading of the "charge" provision to prohibit verification of a charge after the filing period. *Id.* In concluding that the amended charge related back to the original filing date, this Court considered: 1) the plain meaning of Title VII filing requirements; 2) the validity of the EEOC regulation allowing amendments; and 3) the congressional purpose and intent of Title VII. Likewise, this court should review allegation amendments received after the filing period using the same considerations.

The charge provision of the ADA (incorporating Title VII) states in part, "a charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . ., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . ." 42 U.S.C. § 2000e-5(e)(1) and 42 U.S.C. § 12117.

There is no dispute that Petitioner filed his original charge alleging retaliation, and race and gender discrimination within 300 days, as required by Texas. The dispute arises as to the timeliness of his amended charge alleging disability discrimination more than 300 days after denial of the T-1 positions. While acknowledging a narrow exception for amended charges, the court of appeal declined to follow its prior holdings in *Sanchez* and *Hornsby*. In concluding that Petitioner could not amend his charge after 300 days, the court reasoned that the issue was not whether an employee adds facts when adding an allegation (as Petitioner argued), but whether the employee included sufficient facts in his original complaint to put the employer on notice that the employee might have additional allegations of discrimination. *Manning* at 879. This conclusion is inconsistent with the statute and regulation governing original and amended charges. The only notice requirement by statute is that the EEOC's notice to the employer include "the date, place and circumstances of the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(b). This Court has recently stated an "unlawful employment practice" is a discrete act such as termination, failure to promote, denial of transfer, or refusal to hire. *National Railroad Passenger Corp. v. Abnermorgan, Jr.*, 536 U.S. 101, 114 (2002). Notice of the specific allegation is not required by statute. As long as the charge explains the facts related to the unlawful employment practice or discrete act, it is deemed sufficient.[9]

For the sake of argument, even if the original charge had to include "the requisite notice" of the specific type of discrimination (or at the very least facts "sufficient" to put the employer on notice of an additional allegation), as the appeals court has held, Petitioner's charge would still be amendable

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[9] Arguably, the filing of a "Charge of Discrimination" implies some form of discrimination. Thus, the employer has knowledge that the employee is alleging some form of discrimination.

after the filing deadline because Respondent provided documents to the EEOC during the original investigation period that proved Respondent had actual notice of a potential disability allegation. *See Appendix E* at 49a. Boldly printed on Petitioner's T-1 Candidate Evaluation Form is the phrase "Americans Disabilities Act-Stutterer." Nevertheless, when balancing the notice requirement with the remedial purpose of Title VII, this Court has chosen to honor the remedial purpose of legislation. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1981).

The court in *Manning* as well as other courts of appeal courts have erroneously interpreted the law governing original and amended charges. The statute provides, "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). Congress has empowered the EEOC with rule-making authority on the content of the charge. The applicable EEOC regulation provides: "each charge *should* contain the following: (1) the full name, address and telephone number of the person making the charge except as provided in § 1601.7; (2) the full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent); (3) a clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: *See* § 1601.15(b); (4) if known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and (5) a statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency." 29 C.F.R. § 1601.12(a).

Petitioner's original and amended charges clearly included the statutory requirements and the recommended regulation information. *Appendix E* at 49a.[10]

Notwithstanding a charging party's failure to provide information in 29 C.F.R. § 1601.12(a), a charge is sufficient when the Commission receives from the person making the charge, a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. 'Such amendments' *and* 'amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received.'" 29 C.F.R. § 1601.12(b).

By definition, "amplify"means to enlarge, increase, enhance or expand. An "allegation" is an unproven belief. In the amended charge, Petitioner simply enlarged or expanded his belief that Respondent had discriminated against him because of his disability when it denied him promotion to the T-1 positions. This amplified allegation is to relate back to the original filing date based on the plain meaning and reading of the statute. As the court correctly held in *Sanchez*, the regulation sentence, "a charge may be amended to cure technical defects or omissions, including failure to swear to the charge or to clarify and *amplify allegations* made therein, and such amendments relate back to the original filing date," includes allegations that have not been checked on the EEOC Charge of Discrimination Form so long as the original amended charge facts are the same. *Sanchez* at 462.

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[10] The original charge included all information in the amended charge, except "IV. I wish to amend this charge to include being denied promotion because of my disability, as defined by, and covered under, the Americans with Disabilities Act."

Still, other courts have often misinterpreted the amended charge regulation. They have compounded "amendments relating the verification, clarification and amplification" with the "amendments relating to additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." However, the plain reading of the regulation supports two types of amendments: 1) amendments to cure technical defects and omissions (such as verification, amplification and clarification) in the original charge; *and* 2) amendments that alleged different acts which constitute unlawful employment practices related to or growing out the subject matter of the original charge. Under the first, as long as the facts are the same or similar, the charging party may amend after the filing deadline. It merely attached a different legal conclusion to the same set of facts. Under the second, the amendment alleging "additional acts" must be related to or growing out of the subject matter of the original charge. For example, an original charge based on a denial of a promotion due to gender could not be amended after the filing period to include a denial of a transfer due to age, unless the age claim for the transfer could independently satisfy the filing requirement. This makes sense because the 180 or 300 day time period begins to run when the employee is a victim of an adverse act (i.e. promotion denial, transfer, termination, etc.). *See National Railroad Passenger Corp. v. Abnermorgan, Jr.*, 536 U.S. 101, 110 (2002).

Much like the reasoning in *Sanchez*, this Court in *Edelman* concluded that charging parties are not cut off from remedies available to them simply because the charge was not verified or failed to attach the correct legal conclusion. *See Edelman* at 115 and *Sanchez* at 464. Both cases were also consistent with the legislative intent and purpose of Title VII. In *Edelman*, this Court stated that Congress presumably did not mean to affect the nature of Title VII as a remedial scheme in which layperson, rather than lawyers, are expected to initiate the process. *Edelman* at 115. The Court also adopted the

EEOC amendment regulation as reasonable and consistent with the Title VII statute. *Id.* at 114. Additionally, this Court has declined to adopt a strict interpretation of technical rules in a statutory scheme in which laypersons, rather than trained lawyers initiate a process. *See Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1971).

In this case, Petitioner was not assisted by counsel when the original charge was prepared and filed in or about October 1998. *See Appendix E* at 42a. After Petitioner met with an attorney in September 1999 he, through his attorney, immediately notified the EEOC of potential ADA violations. *See Appendix E* at 49a. When his attorney alerted the EEOC of documents relating to an ADA violation in its investigation file for the original charge, EEOC took immediate action and revoked the dismissal and notice of rights pursuant to 29 C.F.R. § 1601.21(b)(1). *Appendix E* at 47a.

Clearly, based on the law and facts, Petitioner's disability allegation related back.

III. THE TIME TO FILE AN EEOC CHARGE FOR SUBSEQUENT DISCRIMINATORY ACTS IS EQUITABLY TOLLED WHEN A CHARGING PARTY DETRIMENTALLY RELIES ON THE TIMELINESS OF AN AMENDED CHARGE, FEDERAL REGULATIONS AND CASE LAW, AND THE ACTIONS OF THE EEOC AND EMPLOYER.

Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that like a statute of limitation, is subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans Work Airlines, Inc.*, 455 U.S. 385, 393 (1981). The Supreme Court has not specifically addressed the circumstances under which equitable tolling may be appropriate. It has allowed the lower courts to make equitable tolling determinations on a case by case basis. As a result, lower court rules have no uniformity which provides fertile ground for courts to abuse their discretion.

Circuit and district courts have varying guidelines for equitable tolling/estoppel in employment discrimination cases. The Third and Fifth Circuits have identified three bases for equitable tolling: 1) the pendency of a suit between the parties in the wrong forum; 2) the plaintiff's lack of awareness of facts support his claim because defendant's intentional concealment of them; and 3) the EEOC misleading the plaintiff about his rights. *Oshiver v. Levin, Fishbein, Sedren, & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994); *Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 644 (5th Cir. 1988). The Tenth Circuit tolls the time period where a plaintiff has been lulled into inaction by an employer, state or federal agencies or the courts. *Gonzalez-Aller Bakeyro v. GTE Lenkurt, Inc.*, 702 F.2d 857, 859 (10th Cir. 1983). The Eighth Circuit applies equitable tolling for excusable neglect which may or may not be attributable to the defendant. *Lawrence v. Cooper Communities*, 132 F.3d 447, 451 (8th Cir. 1998). The Sixth Circuit employs equitable tolling where a charging party timely asserts his right in the wrong forum. *Morgan v. Washington Mfg., Co.*, 660 F.2d 710 (6th Cir. 1981). The Fourth Circuit finds equitable tolling appropriate where the EEOC failed to take action on a charge. *Waiters v. Robert Bosch Corp.*, 683 F.2d 89, 92 (4th Cir. 1982). The Eleventh Circuit has applied equitable tolling where the employer promised to remedy the discrimination. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992).

While this Court has recently stated equitable tolling is to be applied sparingly where a party attempts to gain access to the court out of vague sympathy for particular litigants, there are still circumstances that warrant equitable tolling. *See Zipes*.

Here, Petitioner filed a charge of disability, race, gender discrimination and retaliation in November 1999. *Appendix E* at 41a. This case poses a unique situation because the cases

cited for equitable tolling were cases where the litigants either failed to file an EEOC charge or their EEOC charge was untimely. This is not the case here. Petitioner was not required to re-file a new charge of disability discrimination once he received a dismissal and right to sue under Title VII and the ADA. *Appendix E* at 39a.. It is well established law that after Petitioner files an EEOC charge of discrimination, there is no need to re-file for subsequent acts of discrimination related to allegations made in the prior charge. *See Love*, 404 U.S. at 526 (affirmed by *Zipes*, 455 U.S. at 397). To require a second "filing" by an aggrieved party after termination of a state proceeding would serve no purpose other than the creation of another procedural technicality. *Love* at 526.

The parties agree that Petitioner was not required to re-file a charge of retaliation after being denied the Cedar Bayou and Kingwood transfer positions on July 18, 2000.[11] However for the first time on June 8, 2001, Respondent argued that Manning failed to exhaust his administrative remedies on the disability claim for denial of the Cedar Bayou transfer positions in July 2000 and later in November 2000. Because Respondent failed to seek summary judgment or dismissal on the disability claim for the Cedar Bayou position on March 25, 2000, it waived it.[12] One reason for the delay in waiting until June 8, 2001 to assert this defense was because Petitioner's 300 filing period would expire, based on Respondent's calculations, May 15, 2001. On June 14, 2001,

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[11] On August 22, 2000, Petitioner amended his complaint to include a retaliation claim for denial of the Cedar Bayou and Kingwood transfer positions in July 2000. He did not re-file a charge with the EEOC for the transfer denials.

[12] March 26, 2001 was the deadline for Respondent to file all dispositive motions at the district court level.

the court dismissed as untimely all of Manning's disability claims.[13]

Petitioner also took immediate action upon learning of Respondent's new defense and the adverse district court ruling. Petitioner promptly filed his claim with the EEOC alleging discrimination for the denial of the Cedar Bayou positions filled in July 2000 and November 2000. While disputed, based upon deposition testimony, the three candidates that Respondent selected in July 2000 did not accept the Cedar Bayou positions. These positions remained opened until November 2000 when these positions were filled by additional candidates. Petitioner was not offered these positions at that time. Thus, Petitioner filed a charge claiming discriminatory acts occurring in July 2000 and November 2000. However upon notice of the district court's final judgment dismissing Petitioner's entire lawsuit, the EEOC dismissed Petitioner's July 2001 disability charge citing "court decision" as its reason. From this notice, Petitioner timely filed a lawsuit pro se' in January 2002 on the disability claim for the Cedar Bayou positions. Upon motion by Respondent, the district court dismissed Petitioner's lawsuit based on res judicata and imposed sanctions against him.[14]

Clearly, Petitioner met, if not exceeded, the standard for equitable tolling. He did not abandon or neglect his disability claim for the Cedar Bayou positions. His attorney reasonably

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[13] Responding to Respondent's untimely defense for the Cedar Bayou disability claim, on June 14, 2001, Petitioner, in the alternative, argued equitable tolling and waiver during oral argument, to no avail.

[14] By the time Petitioner filed the second suit on the Cedar Bayou disability claim, the first lawsuit was pending on appeal to the U.S. Court of Appeals for the Fifth Circuit. Petitioner exercised due diligence in protecting his claims in case of reversal. *See Purrington v. University of Utah*, 996 F.2d 1025, 1031 (10th Cir. 1993). Yet he was sanctioned for doing so.

relied on case precedent in *Sanchez* as well as the EEOC's action after Petitioner filed the disability discrimination amendment in November 1999. *See Appendix E* at 38a-47a. As such, there was no reason to re-file another EEOC charge alleging disability discrimination prior to filing suit. The amended charge should have sufficed for subsequent acts of disability discrimination, including the Cedar Bayou transfer positions. *See Love* at 526.

Respondent should not be rewarded for its conduct in: 1) failing to object to and allowing discovery related to the Cedar Bayou disability claim; 2) failing to oppose complaint amendments based entirely on the Cedar Bayou disability claim; 3) failing to timely file a dispositive motion on the Cedar Bayou position; and 4) failing to specifically assert failure to exhaust administrative remedies for the Cedar Bayou disability claim in its Third Amended Answer, so Petitioner would have notice. Based on Respondent's action or inaction, Petitioner's time should have been tolled and Respondent should be equitably estopped from asserting this defense.

The term "equity" denotes the spirit or habit of fairness, justness and right dealing which would regulate the intercourse of men. Black Law Dictionary, (6th Ed. 1990). As such, Petitioner should be allowed, at the very least, to continue his disability discrimination claim for denial of the Cedar Bayou positions.

CONCLUSION

For the reasons stated in this petition, Petitioner, Ronald H. Manning, respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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